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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 405

JERRY B. McCOY, Petitioner,

v.

A. S. H. SHAW, as State Auditor of the State of Oklahoma, and THE PURE OIL COMPANY, a Corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

ROBERT M. FAINLY,
STEPHEN B. PLATT,
Counsel for Petitioner.

MOORE & WEST,
FAINLY, PLATT, GREEN & ANDERSON,
CALVIN JONES,
Of Counsel.

(22,865)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 403

JERRY R. McCOY, PETITIONER,

v.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, AND THE PURE OIL COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner prays a writ of certiorari to be directed to the Supreme Court of the State of Oklahoma to reverse a decree rendered by it on the 10th day of May, 1927 (R., 25), which affirmed a judgment of the District Court of Oklahoma County, and respectfully shows:

1*d*

Statement of Case.

The petitioner, Jerry R. McCoy, is a Chickasaw Indian of one-fourth Indian blood and duly enrolled as a member of such Tribe in the State of Oklahoma. As such Chickasaw Indian there was patented to him the land described in the record, situated in Carter County, Oklahoma, a portion of which is what is known as homestead allotment and the other is his surplus allotment. His patent for his surplus was dated March 23, 1907, and his patent for his homestead was dated March 21, 1907. Several years before this action was commenced in the district court, and while McCoy was still a minor, the land was leased to Pure Oil Company in the usual form for oil and gas leases, providing that the owner, McCoy, should have a royalty of one-eighth of the oil produced, pursuant to which lease the lessee found oil upon the premises several years before the action was commenced and while the petitioner was still a minor, and oil is still so being produced from the premises.

By Section 29 of the Act of Congress of June 28, 1898, ratified August 24, 1898, commonly known as the Atoka Agreement, 30 Statutes, 495, it is provided:

> "All the lands allotted shall be nontaxable while the title remains in the original allottee but not to exceed twenty-one years from date of patent. * * *"

In 1916 the Legislature of Oklahoma passed an act known as the gross production statute (Compiled Okla-

homa Statutes 1921, Section 9814) providing, among other things, for the payment of a tax of three per centum of the gross value of the production of petroleum or other crude or mineral oil, the same to be paid quarter-annually for the periods ending March, June, September and December. The act provided also that the owner of the royalty should pay such tax upon his interest and excepted royalty interest of the State and such royalty interests as are excepted from taxation under the laws of the United States and provided that such tax upon the royalty interest should be a lien thereon. The act also provided that such payment is in lieu of and is a payment of all taxes upon any property rights attached to or inherent in the rights to said minerals, upon leases for the mining of petroleum or other crude or mineral oil and upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land and upon the machinery, appliances and equipment in and around any well producing petroleum or other crude or mineral oil and actually used in the operation of such well, and also upon the oil mentioned during the tax year in which the same is produced and upon any investments in any of the leases, rights, privileges, minerals or property mentioned.

In 1925 (S. L. 1925, page 20) the Legislature of Oklahoma passed an act purporting to authorize the State auditor to order the lessee or purchaser of the oil to withhold from the landowner a sufficient part of his royalty to pay the tax in case the landowner failed to

pay same. Section 2 of said act, which became effective April 2, 1925, is as follows:

> "The purchaser of all oil, gas or other minerals as hereinbefore referred to, shall recognize the State Auditor's order to withhold payment for all production wherein the gross prodiction tax and penalty are unpaid, until such tax and penalty are paid, and on failure of the producer or royalty owner to pay such tax and penalty, the purchaser of such production shall, on order of the State Auditor, pay such tax and penalty, and his receipt therefor shall be accepted by such producer or royalty owner in lieu of cash in settlement for such production."

McCoy became of age in the spring of 1925. Thereafter, there being some unpaid tax which the State Auditor alleged was due from McCoy on account of this royalty, the State Auditor issued an order to the Pure Oil Company to withhold from McCoy the sum of $1,054.63, which the auditor claimed was the tax then due with penalty and ordered the oil company to continue to withhold the tax for each quarter-annual period accruing in the future, all of which has been done by that company. On account of the slight degree of Indian blood of McCoy, all restrictions on the alien ability of his land were removed by Section 1 of the act of Congress of May 27, 1908. 35 Stat., 312. McCoy, still being the owner of his allotted land from which this oil was produced as stated, commenced his action in the District Court of Oklahoma County on October 20, 1925, to enjoin the State Auditor from his said acts; to cancel the said order made by the State

Auditor; to require the oil company to ignore the same, and to permanently enjoin and forbid the Auditor, his employees and successors, from attempting to collect any such tax. In addition to setting up the foregoing facts in his petition McCoy alleged that his said royalty was exempt from any such taxation on account of the fact that the lands from which the same was produced was so exempt from taxation; that to so attempt to tax his portion of said oil is contrary to and in violation of the laws of the United States as contained in the agreement between the United States and the Choctaw and Chickasaw Nations and in violation of the exemption from such taxation as was contracted with said McCoy and guaranteed to him under the said agreement and acts of Congress relating thereto. He also alleged the fact that the said gross production statute of Oklahoma as construed by the Supreme Court of the State (*in re* Skelton Lead & Zinc Co., 81 Okla., 134; 197 Pac., 495), was a tax upon the mining business as a going concern, and is a payment of a tax upon numerous rights, including the machinery, appliances and equipment used in and around a well producing petroleum; that only the lessee had any such machinery or equipment and that he, McCoy, had nothing except the land in connection with such production, and that, therefore, to require McCoy to pay 3 per cent of his part of the oil, which paid upon the oil alone, and to permit the lessee to pay 3 per cent upon his part of the oil, which was a payment of the tax upon all of these other rights, constituted a taking of his property to pay the tax of the lessee without

compensation to him, depriving him of his property without due process of law, and was a denial to him of the equal protection of law and imposed upon him a tax which was not uniform among the people obtaining oil from beneath the surface of the earth, and is a discrimination in said taxation laws against him. He further alleged that the said gross production tax law in fact exempted his royalty from such taxation, but that the State Auditor was erroneously holding and ruling that the same was not exempted, but was subject to said tax. He alleged that he is the owner of other valuable real estate in Oklahoma County, and that the said statute on its face attempts to make such tax a lien upon all the property of McCoy and was therefore apparently a cloud thereon and there was no means or method of removing such cloud except by his action; that such a lien was invalid and was not due process of law as against him. He also alleged that the action of the State Auditor, in issuing his said order, was in violation of the laws of the United States, and that he and his successors should be enjoined from unlawfully and wrongfully interfering with the rights of McCoy and attempting to impose this unlawful and void tax, and unless enjoined the State Auditor would continue in the future to order the withholding of the portion of McCoy's royalty to pay this tax, all of which would be without authority of law and in violation of the rights, immunities, exemptions and privileges guaranteed to McCoy under the said Atoka agreement and the acts of Congress relating thereto. He further alleged that the purported tax upon his royalty and

the attempt to enforce the same violates his rights and imposes unlawful and injurious burdens and charges upon him in freeing himself and his property from such injurious and unlawful taxes and will cause him to employ attorneys and bear other unjust burdens, costs and charges in that regard and that he will also suffer continued irreparable damage and injury and that he is without adequate remedy at law. He therefore prayed that the Auditor and his successors be permanently enjoined from collecting or attempting to collect such tax on this royalty, and that the order of the State Auditor to the oil company to withhold any portion of the same be annulled and set aside; that the oil company be directed to ignore said order as well as any further orders from the State Auditor, and that he have all such other general and equitable relief as may be proper.

The oil company filed an answer admitting that the Auditor had made such order upon it and that it was holding the moneys due McCoy on his royalty in order to apply same as a payment on the tax.

The auditor filed a motion to dismiss and an amended motion to dismiss, which however is but a general and special demurrer, as the motion to dismiss for the grounds set forth in such motion is unknown to the Oklahoma practice and is really a demurrer. The matter coming on for hearing before the trial court, the motions treated as demurrers were sustained and the plaintiff's petition ordered dismissed.

McCoy thereupon appealed to the Supreme Court of the State of Oklahoma which affirmed the trial court,

A. S. J. Shaw having succeeded Childers as Auditor and being duly substituted in the Supreme Court, 256 Pac., 25 (not yet officially reported); the syllabus of which decision is as follows:

> "1. Section 9814, Compiled Oklahoma Statutes, 1921, relating to a lien for gross production tax upon a royalty interest provides that 'the amount of tax on the royalty interest shall be a lien on such interest,' and such a provision for such a lien on such interest is construed *strictissimi juris* and excludes a lien for such interest upon any other property, notwithstanding Section 9817, Compiled Oklahoma Statutes, 1921, which provides generally for the levy and collection of said gross production tax from the property, assets and effects of such persons, firm, association or corporation, and constitutes the tax a lien upon such property, and provides for a suit thereon.
>
> "2. Section 9814, *supra*, permits an aggrieved taxpayer of a gross production tax to pay such tax under protest and giving of notice, and the institution of an action at law to recover the same, and such a remedy is adequate, speedy, complete and exclusive" (R., 16-17).

Petition for rehearing was filed by McCoy, which was later amended and was denied by the Oklahoma Supreme Court on May 10, 1927 (R., 25), and he now applies to this Court for a writ of certiorari to review the action of the Supreme Court of Oklahoma.

Statement of the Merits.

Before discussing the error of the Supreme Court as to the point of procedure upon which it affirmed the trial court ordering the action dismissed, we believe we should set forth the law showing that this royalty is not taxable, as it will be unnecessary for this Court to examine the decision of the Oklahoma court for error upon the point on which it decided the case, if in fact this royalty is taxable. The contention of McCoy is that his royalty is not taxable, inasmuch as the same is his portion of his own oil taken by him from his allotted land, which is not taxable.

Pollock *v.* Farmers Loan & Trust Co., 157 U. S., 429; 39 L. Ed., 759.

Thomas *v.* Gay, 169 U. S., 264; 42 L. Ed., 740.

Gillespie *v.* State of Okla., 257 U. S., 501; 66 L. Ed., 338.

Jaybird Mining Co. *v.* Weir, 46 Sup. Ct. Rep., 582.

Colonial Trust Co. *v.* Lewellyn, 12 Fed. (2nd), 481.

The case of Gillespie *v.* Okla., *supra*, seems to settle this question; therein this very gross production tax of Oklahoma is discussed, as is also the income tax law, and this Court treats the decisions as equally applicable and as settling the principle, whether the subject under discussion is gross production tax or income tax, and announced in that case the rule applicable to both such classes of taxation in the following language:

> "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void. * * *"

See, also, Lake Superior Consol. Iron Mines *et al. v.* Lord *et al.*, 271 U. S., 577.

State *v.* Snyder (Wyo.), 212 Pac., 758.

State of Texas *v.* Hatcher (Tex.), 281 S. W., 192.

Opinions from Attorney General, Vol. 19, page 161.

We next contend that to attempt to tax McCoy's royalty is an interference with the purpose and policy of the Federal Government and in that respect an interference with and a violation of a Federal agency. When this treaty was made in 1898 it was then the policy and hope of the national Government to teach the Indian the individual uses and ownership of property and thus to prepare him to take his place alongside the other citizens of the United States, totally abandoning the old tribal government and the common ownership of land. This was to be a marked step in the change of mode of the Indian's life; one of the main, if not the main, purposes which Congress had in mind and at any rate its greatest hope was for the Idians to use their land to the fullest extent, thus enabling them to rely upon their own means and to support themselves individually, separately and apart from any community aid. There are still some In-

dians who are incompetent to take care of themselves, and the Government, in caring for such Indians' lands, deems it its duty to see that the ores are mined therefrom for the benefit of such Indians and that the lessee, which is the instrumentality or part of the instrumentality for that purpose, is but a part of the scheme of the Government in fulfilling that duty.

We quote from the case of Jaybird Mining Co. *v.* Weir, *supra*, as follows:

> "The lessee is an agent or instrumentality employed by the government for the development and use of restricted lands and to mine ores therefrom for the benefit of its Indian wards."

And, again,

> "In each of these cases the tax was condemned as an attempt to tax an instrumentality used by the government in fulfilling its duty to the Indian."

If the Government, while acting as guardian of the Indian, deemed it to be its duty "to develop and use the Indian's land and mine the ores therefrom for the benefit of the Indian," then surely the Government, when it turned the land over to the Indian, wished the Indian to do those things for himself. The allottee himself is the instrumentality of the Government for those purposes just as much so as was the lessee where the Government was acting as guardian and employed a lessee to obtain the ores or oil from the land.

So we say that the Government desired that McCoy should use this land, should mine the ores therefrom

including this oil, and that the attempt to tax him upon the same would interfere with the policy, purpose and scheme of the Government and in fact would destroy its whole purpose.

United States *v.* Rickert, 188 U. S., 432; 47 L. Ed., 532.

Any scheme, policy or method employed by the Government is such governmental agency as is laid down in McCurdy *v.* United States, 246 U. S., 263; 62 L. Ed., 706, as follows:

> "Congress apparently believed that, in order to prepare the Indian for complete independence, he must be educated in self-control, and that this could best be done by committing to him gradually the care of his property.
>
> * * * * * * *
>
> "The policy of education and development through the bank account had been tried and found promising.
>
> * * * * * * *
>
> "It is education through the responsibility for spending * * * which constitutes the instrumentality employed by the Government in fitting the individual Osage Indian to take his full part as a citizen of the United States."

This tax exemption of McCoy's, arising under said agreement, constituted a contract between the Chickasaw Tribe and the National Government.

Choate *v.* Trapp, 224 U. S., 665; 56 L. Ed., 941.

It is a vested property right and as such is immune from interference by State legislation.

Choate *v.* Trapp, 224 U. S., 665; 56 L. Ed., 941.
Ward *v.* Love County, 253 U. S., 17; 64 L. Ed., 751.
Berryman *v.* Board of Trustees of Whitman College, 222 U. S., 334.

If, after mature consideration of the question as to whether or not this royalty is taxable, there should still be a lingering doubt as to whether or not it is taxable, this very doubt itself resolves the question in favor of the Indian, as the agreements with the Indians are liberally construed in their favor, as was said in Choate *v.* Trapp, *supra*, as follows:

> "But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt or if there were any question as to whether this was a personal privilege and repealable or an incident attached to the land itself for a limited period, that doubt under this rule must be resolved in favor of the patentee."

Surely the Government, when it was trying to encourage the Indian to use his land, did not wish that he should be hampered and discouraged by having a tax imposed upon him each time he broke the crust of the earth in the uses thereof or to obtain some deposit from beneath the surface thereof, or if he should make it up into brick or sell some of the gravel therefrom by the wagon load. The Indian certainly did not un-

derstand that he was to be so taxed. He used the broadest term possible by saying that his land should be non-taxable, which covered every character of tax, whether it should be denominated income tax, gross-production tax, license tax, occupation tax, or otherwise. The name of the tax is immaterial.

Choate *v.* Trapp, *supra.*

Choctaw, O. & G. R. Co. *v.* Harrison, 235 U. S., 292; 59 L. Ed., 237.

As to the Decision of the Supreme Court of Oklahoma.

It will be noted that the Supreme Court of Oklahoma decided this case on the ground that the statute of Oklahoma was exclusive which required the payment of a tax and suit to recover the same. That therefore McCoy could not maintain the present action. The Oklahoma court overlooked the fact that the real substance of the action is to restrain the State and its agencies from violating the vested property rights of the petitioner and to protect his exemption from taxation which arises from his contract with the Federal Government and the Federal enactments relating thereto, which is a vested right and cannot be interfered with by State legislation or State agencies.

Berryman *v.* Board of Trustees of Whitman College, *supra.*

Ward *v.* Love County, *supra.*

Choate *v.* Trapp, *supra.*

This State statute cannot be interposed to justify the officers of the State in attempting to violate the vested

rights of the petitioner as the same are protected by Article 6, Article 10, and the Fifth and Fourteenth Amendments to the Constitution of the United States, and this Court has jurisdiction where such State statutes are attempted by the Supreme Court of the State to be held paramount to the rights of this petitioner.

Bunch *v.* Cole, 263 U. S., 250.

Ward *v.* Love County, *supra.*

Really, the fact that a tax is involved in this action is but incidental. The main purpose and effect of the action is to preserve and protect the vested property right of the petitioner, his exemption from taxation being such right.

Berryman *v.* Board of Trustees of Whitman College, *supra.*

Therefore, the Oklahoma statute, upheld by the Oklahoma Supreme Court, requiring the payment of the tax and the suit to recover same has no application where the matter to be protected is a vested property right and the tax is but incidental and but the means or one of the means of violating such right.

This gross production tax is payable quarterly and, therefore, it would involve four times as much litigation every year as the ordinary tax which is payable annually. It is readily seen that if McCoy were required to follow the Oklahoma statute, he would not only be required to be burdened with the payments of these taxes, in order to maintain his action, but he would be involved in four times as many lawsuits,

paying out four times as much counsel fees and advancing four times as much costs as would ordinarily be the case. So, certainly equity to prevent such multiplicity of suits has jurisdiction, regardless of the Oklahoma statute.

Osborn *v.* Bank of U. S., 9 Wheaton, 738; 60 L. Ed., 204.

U. S. *v.* Rickert, 188 U. S., 432; 47 L. Ed., 532.

Such was the language of Judge Lurton, later Justice Lurton, in the case of Union Land & Planters Bank of Memphis *v.* Memphis, 111 Fed., 561 (a case arising in Tennessee), as follows:

> "If it appears that the tax constitutes a cloud upon the title of the complainant, or that he will be subjected to irremedial damages, or to a multiplicity of suits, if compelled to rely upon a legal remedy alone, equity will interfere on the ground of the inadequacy of the remedy at law."

In the case of Shelton *v.* Platt, 139 U. S., 591, this Court was considering a case which came up from Tennessee which has a statute after which the Oklahoma statute was patterned, and upon the authority of a decision from this Court (Tennessee *v.* Sneed, 96 U. S., 69), based on said statute, the Oklahoma decision relies. Yet this Court in the Shelton case, even though Tennessee had such a statute which was upheld, uses this language:

> "And while an unconstitutional tax may, in the language of the learned Judge holding the Circuit Court, confer no right, impose no duty

> and support no obligation, it will be perceived that in our view the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury, *or other ground for equitable interposition is not shown to exist.*"

The court found in that case, however, that irreparable injury was not shown and there was no claim that the injunction was necessary to prevent a multiplicity of suits. Therefore, the injunction was denied.

McCoy in his petition sets up the fact that he will be involved in numerous lawsuits and will, also, suffer irreparable injury. The only reason for saying that the Oklahoma statute, requiring the payment of the tax, is exclusive, is on the theory that the same affords an adequate remedy at law. Yet, as stated in the two cases last cited, a remedy at law is not adequate where a party, in order to rely upon such legal remedy, would be subjected to a multiplicity of suits. The Oklahoma court overlooked this condition of the law.

There is no provision of the Oklahoma law or legal remedy provided where the taxpayer claims his property is exempt and this constitutes an important exception to the doctrine of non-interference by injunction.

Colorado, F. & L. S. Co. *v.* Beerbohm, 96 Pac., 443.

Siegfried *v.* Raymond, 60 N. E., 868.

Bednar *v.* Carroll, 116 N. W., 315.

Lenawee County Savings Bank *v.* City of Adrian, 35 N. W., 304.

St. Mary's Gas Co. *v.* Elk County, 43 Atl., 321.
Crim *v.* Town of Phillippi, 18 S. E., 466.
Union Pac. R. Co. *v.* McShean, 22 Wall., 444; 22 L. Ed., 747.
High on Injunctions, Vol. I (4th Ed.), page 504.
Missouri River F. S. & G. R. Co. *v.* Morris, 13 Kansas, 302.
City of Staunton *v.* Mary Baldwin Seminary (Va.), 39 S. E., 596.

Wherefore, petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Court of Oklahoma, commanding that court to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code and amendments thereto, or that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem appropriate and in conformity with said acts and the amendments thereto, and your petitioner will ever pray.

ROBT. M. RAINEY,
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Counsel for Petitioner.

MOORE & WEST,
RAINEY, FLYNN, GREEN & ANDERSON,
CALVIN JONES,
Of Counsel.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Calvin Jones, being duly sworn, says that he is one of the attorneys and of counsel for the petitioners above named, and as such had personal charge of the case in the foregoing petition mentioned, in the District Court of Oklahoma County, Oklahoma, and the Supreme Court of the State of Oklahoma; that he has read the said petition by him subscribed, and that the facts therein stated are true as he verily believes.

CALVIN JONES.

Subscribed and sworn to before me this 8th day of July, 1927.

[SEAL.] LOTTIE BLIZZARD,
Notary Public.

My commission expires July 12, 1927.